



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 91-005
October 11, 1991

Syllabus by the Commission:

(1) The exemption to the Revolving Door Law of Division (A) of Section 102.03 of the Revised Code, which permits a former public official or employee to be "retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" allows a former official or employee to be employed by all of the public agencies by which he was employed or on which he served;

(2) The exemption to the Revolving Door Law of Division (A) of Section 102.03 of the Revised Code, which permits a former public official or employee to be "retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" applies to the two-year prohibition governing former officials and employees who personally participated while in public service under R.C. Chapter 343. or 3734., as well as to the general, one-year prohibition of the Revolving Door Law;

(3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former county commissioner, for a period of one year after leaving office, from being employed for compensation by a joint solid waste management district if he served on the board of county commissioners when the board of commissioners entered into, and ratified, the agreement creating the solid waste management district.

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You have asked whether the Ohio Ethics Law and related statutes would prohibit you from accepting employment by a joint solid waste management district as its solid waste program director in light of the fact that you served on the board of county commissioners that participated in the establishment of the joint solid waste management district.

By way of history you have stated that you served as a county commissioner from January 1, 1985 to December 31, 1990. During your term of office as a county commissioner, Am. Sub. H.B. 592 was passed by the 117th General Assembly, effective June 24, 1988. Am. Sub. H.B. 592 enacted R.C. 3734.52(B), which states that the board of commissioners of each county "shall" either establish a county solid waste management district under R.C. Chapter 343. or establish, with the board of county commissioners of one or more other counties, a joint solid waste management district under Chapter 343. R.C. 3734.52(D) provides a procedure by which the Director of the Ohio Environmental Protection Agency can direct any county not complying

with R.C. 3734.52(B) to enter into an agreement to establish a joint solid waste management district under R.C. Chapter 343. The board of county commissioners on which you served chose to comply with Division (B) of R.C. 3734.52.

You have also stated that on March 23, 1989, the board of county commissioners on which you served, together with the boards of commissioners of two other counties, entered into an agreement to form a joint solid waste management district pursuant to R.C. 343.01(B). The board of commissioners subsequently ratified the agreement by resolution, as required by R.C. 343.01(B). You participated as a county commissioner by signing the agreement and voting in favor of ratifying the agreement.

Following creation of the joint solid waste management district, you became a member of the board of directors of the district, pursuant to R.C. 343.01(B), which states that "the boards of county commissioners of the counties establishing a joint district constitute, collectively, the board of directors of the joint district." You also became a member of the policy committee of the district pursuant to R.C. 3734.54(B), which provides that each joint solid waste management district must establish and convene a solid waste management policy committee to prepare the solid waste management plan of the district, and the policy committee of a joint district shall include the president of the board of county commissioners or his designee from each county within the joint district. You served in those positions until you left public office as a county commissioner on December 31, 1990.

You have stated that the 1989 agreement among the three counties creating the district does not deal specifically with the hiring of employees by the district, but deals only with the district reimbursing each of the counties for the services of county employees used by the district. See R.C. 343.01(B) (permitting such arrangement). The agreement did not provide for the creation of the position of solid waste program director. You have also stated that the only employee (other than consultants) engaged by the district while you were a county commissioner and member of the district board of directors and policy committee was an interim administrator, who was hired at the September 25, 1989 meetings of the policy committee and board of directors. You have stated that this was the only contract entered into by the district for personnel, other than for consultants, which you authorized or participated in authorizing while you were a member of the board of directors and the policy committee. You state that, through the time you left public office on December 31, 1990, there had been no discussion of providing for a permanent director. The first discussion of the position of program director occurred at the April, 1991 meeting of the policy committee, and there were later discussions at the May and June meetings. At the June meeting, the policy committee decided to advertise for the director position, and to accept applications.

You have stated that you applied for the new position in response to this advertisement, and that you did not, at any time, use the authority or influence of your public office to create the position of solid waste program director. You were offered the job by the district in September, 1991. See R.C. 343.01(B) (board of directors of a joint district may appoint and fix the compensation of employees).

The general provision of Division (A) of Section 102.03 of the Revised Code, Ohio's Revolving Door Law, prohibits a former public official, for a period of one year after leaving public service, from representing a new employer or any other party before any public agency on any matter in which he personally participated while in public service. An additional, two-year restriction is also imposed on former officials who, during their public service, personally participated "through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code." These former officials are prohibited, for a period of two years after leaving public service, from representing "a person who is the owner or operator of a facility, as defined in section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, on any matter in which he personally participated as a public official or employee." (R.C. 3734.01(N) defines "facility" as: "any site, location, tract of land, installation, or building used for the incineration, composting, sanitary landfilling, or other methods of disposal of solid wastes; for the transfer of solid wastes; for the treatment of infectious wastes; or for the storage, treatment, or disposal of hazardous waste.") This additional provision was enacted by the 117th General Assembly in Am. Sub. H.B. 592, effective June 24, 1988, and was amended by the 118th General Assembly in Am. Sub. S.B. 382, effective January 1, 1991. See Ohio Ethics Commission Advisory Opinion No. 91-003. Therefore, you are, as a former county commissioner who personally participated in the development or adoption of a solid waste management plan and through other substantial exercise of administrative discretion under Chapters 343. and 3734. of the Revised Code, subject to both the general Revolving Door Law, and the two-year Revolving Door provision under R.C. 102.03(A).

However, R.C. 102.03(A) also states that "[n]othing contained in this division shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served." The term "public agency" is defined in R.C. 102.01(C) for purposes of R.C. 102.03 to include "any department, division, institution, board, commission, authority, bureau or other instrumentality of...a county...or any other governmental entity." The exemption of R.C. 102.03(A) is available to a former county official only with respect to the particular entity or office of the county with which he previously served, and does not permit him to represent any other county department, division, office, or agency of the county in contravention of the prohibition of R.C. 102.03(A). See Advisory Opinion No. 91-009. However, in this case, you served with more than one public agency. You served with the board of county commissioners, and, by virtue of your position with the board of commissioners, you served with the joint solid waste management district. The exemption of R.C. 102.03(A) permitting a former official to be employed by the "public agency by which he was employed or on which he served" may, according to the rules of statutory construction, be read to permit him to be employed by the "public agencies" on which he served. See R.C. 1.43 (in construing a statute, "the singular includes the plural, and the plural includes the singular"); Advisory Opinion No. 89-004. Because you previously served on the board of directors and on the policy committee of the joint solid waste district, you are exempted from the prohibitions of R.C. 102.03 (A), to the extent that you are permitted to be employed by the joint solid waste district. This exemption was enacted prior to the time the special environmental, two-year prohibition was enacted in 1988. See Am. H.B.1040, eff. August 27, 1976, 111th General Assembly. However, there is no indication in the

statutory language that the General Assembly did not intend for the exemption to apply to the two-year provision, as well as the general one-year provision. If the General Assembly had not intended for the exemption to apply to the environmental, two-year prohibition, it could have easily so provided. The exemption follows the language of both the general provision and the environmental provision, and there is no express language or other indication that the exemption is not meant to apply to both prohibitions.

Therefore, R.C. 102.03(A) would not prohibit you from being employed by the solid waste management district since you served, as a public official, on the board of directors and on the policy committee of the district.

You are, however, also subject to Division (A)(3) of Section 2921.42, which reads as follows:

(A) No public official shall knowingly do any of the following:

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer of any political subdivision of the state. See R.C. 2921.01(A). A member of a board of county commissioners is a "public official" for purposes of R.C. 2921.42. See R.C. 305.01; Advisory Opinions No. 80-006 and 89-004. As a former county commissioner, you are subject to the prohibition of R.C. 2921.42(A)(3) for one year from the date you left office.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision or its agencies or instrumentalities. A legislative body, commission or board will be deemed to have authorized a public contract where the contract could not have been awarded without the official's or board's approval. See Advisory Opinions No. 87-004, 88-006 and 88-008. A former official who served on a legislative body, commission, or board is subject to the prohibition of Division (A)(3) regardless of whether he participated in discussions or voted on the contract as a member of the legislative body, commission, or board. See Advisory Opinions No. 87-008, 88-006 and 88-008. However, the prohibition does not apply to the official with regard to any contract authorized or approved by the body, board, or commission prior to, or subsequent to, the official's service on the entity. See Advisory Opinion No. 88-008.

You were serving on the board of county commissioners at the time the board entered into and ratified an agreement with the boards of commissioners of two other counties to establish and maintain the solid waste management district. You signed the agreement, and voted to ratify the agreement. You are now seeking employment with the district. In Advisory Opinion No. 87-004, the Commission addressed the issue whether the former director of the state department of development was prohibited from serving as an employee of an enterprise which

received a public contract, in this instance a grant, from the department where the director approved the award of the grant to the enterprise, and where the facts indicated that the establishment and operation of the enterprise were dependent upon receipt of the grant, and that the former director's position with the enterprise would not have been created but for the award of the grant. The Commission held that R.C. 2921.42(A)(3) prohibited the former director, for a period of one year after leaving public service, from receiving compensation for serving in a position which would not have been created but for the award of a public contract authorized by him. As affirmed in Advisory Opinion No. 88-008, a public official who serves with a company that is awarded a public contract is deemed to profit from that public contract for purposes of R.C. 2921.42(A)(3) where the establishment or operation of the company is dependent upon receipt of the contract or the creation or continuation of the official's position with the company is dependent upon the award of the contract.

In this instance, the establishment and operation of the joint waste management district were dependent upon the March, 1989 agreement of the boards of commissioners, and the district's position of solid waste program director would not have been created but for the agreement of the county commissioners establishing the district. The agreement could not have been approved without the approval of the board of commissioners and you were serving on the board of commissioners at the time the agreement establishing the district was entered into and ratified by the board. See R.C. 343.01(A) and (B); R.C. 3734.52(A) and (B). Therefore, the issue is whether the March, 1989 agreement establishing the joint solid waste management district is a "public contract" for purposes of R.C. 2921.42(A)(3).

As set forth above, a public contract is defined for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision.

R.C. 3734.52 and 343.01 provide for the creation, by two or more boards of county commissioners, of a joint solid waste management district with jurisdiction over all of the incorporated and unincorporated territory of the counties "for the purposes of preparing, adopting, submitting, and implementing the solid waste management plan for the ... joint district and for the purposes of providing for, or causing to be provided for, the safe and sanitary management of solid wastes within all of the incorporated and unincorporated territory of the ... joint solid waste management district." R.C. 3734.52. See also 3734.53, 3734.54, 3734.55 and R.C. 343.01, 343.02, 343.04. These purposes are reflected in the specific March, 1989 agreement, which further states that:

Each of the Boards of County Commissioners (the County Boards) of the Counties has determined that coordinated action by the Counties for the purposes of preparing, adopting, submitting and implementing a solid waste management plan for the Counties and providing for, or causing to be provided for, the safe and sanitary management of solid wastes within the Counties is necessary to preserve and promote the public health and welfare of the residents of its particular County and will be of common benefit.

Each County Board has determined that, for those purposes and subject to the provisions of [Am. Sub. H.B. 592] it is necessary and appropriate to enter into this Agreement providing for their establishment of a joint solid waste management district.

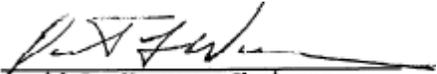
R.C. 343.01(B) authorizes a county participating in a joint district to "contribute lands or rights or interests therein, money, other personal property or rights or interests therein, or services to the district." The specific March, 1989 agreement, as required by R.C. 343.01(B), provides for the respective payment by the participating counties of operating costs and expenses incurred by the district.

It is apparent that the March, 1989 agreement constituted the purchase or acquisition, or a contract for the purchase or acquisition, of services by and for the use of the county with which you served. Those services included the preparation and implementation of a solid waste plan for the county and the safe and sanitary management of solid wastes within the county. The March, 1989 agreement establishing the district is, therefore, a "public contract" for purposes of R.C. 2921.42(A)(3). It is immaterial, for purposes of R.C. 2921.42, that the board was performing what was, in essence, a non-discretionary duty in entering into the agreement. This does not alter the nature of the agreement as being for the purchase or acquisition of services, or being a contract for the purchase or acquisition of services, by and for the use of the county. It is also immaterial that the agreement did not provide for the creation and staffing of the position of solid waste program director, that you were not serving in county or public office when the position was created and offered to you, and that you did not use your authority or position to create or secure the position. Division (A)(3) absolutely prohibits the occupation of a position of profit under the specified restrictions, regardless of whether the former official specifically contemplated occupying the position of profit at the time the public contract was authorized. But compare R.C. 102.03 (D) and (E) (prohibiting a public official or employee from soliciting, or using his authority or influence to secure, anything of value that is of a substantial and improper character); Advisory Opinion No. 87-008. You are prohibited, therefore, by R.C. 2921.42(A)(3), for a period of one year after leaving office, from accepting compensated employment from the district, since you served on the board of county commissioners when the board entered, and ratified by resolution, the agreement.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) the exemption to the Revolving Door Law of Division (A) of Section 102.03 of the Revised Code, which permits a former public official or employee to be "retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" allows a former official or employee to be employed by all of the public agencies by which he was employed or on which he served; (2) the exemption to the Revolving Door Law of Division (A) of Section 102.03 of the Revised Code, which permits a former public official or employee to be "retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" applies to the two-year prohibition governing former officials and employees who personally participated while in public service under R.C. Chapter 343. or 3734., as well as to the general,

one-year prohibition of the Revolving Door Law; and, (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former county commissioner, for a period of one year after leaving office, from being employed for compensation by a joint solid waste management district if he served on the board of county commissioners when the board of commissioners entered into, and ratified, the agreement creating the solid waste management district.



David L. Warren, Chairman
OHIO ETHICS COMMISSION